

December 11, 2007

Congressman William D. Delahunt  
Chairman, Subcommittee on International  
Organizations, Human Rights and Oversight  
Committee on Foreign Affairs  
2454 Rayburn House Office Building  
Washington, DC 20515

Congressman Jerrold Nadler  
Chairman, Subcommittee on the Constitution,  
Civil Rights, and Civil Liberties  
Committee on the Judiciary  
2334 Rayburn House Office Building  
Washington, DC 20515

Dear Congressmen Delahunt and Nadler:

I am one of the attorneys representing Mr. Maher Arar in his case against United States officials for rendering him to Syria, and I represented Mr. Arar when he testified via videoconference at the October 18, 2007 Joint Hearing of the Subcommittees you chair, *Rendition to Torture: The Case of Maher Arar*. Thank you for holding this very important Hearing, and for extending your sincere apologies to Mr. Arar. I am writing to follow up on a question Chairman Delahunt asked at the Hearing regarding whether there had been a request to the Department of Justice to appoint a special prosecutor to investigate Mr. Arar's case, to which I responded that there had been no such request. Counsel for Mr. Arar has not made any such request, as we assumed it would be futile.

However, unbeknownst to Mr. Arar or his counsel, the World Organization for Human Rights USA (now called Human Rights USA) made a request in 2006 to then-Attorney General Gonzales to appoint an independent counsel to investigate extraordinary renditions, and the legal memorandum in support of the request discussed Mr. Arar's case, among others. See Letter from Morton Sklar to Alberto Gonzales (July 13, 2006), and the accompanying legal memorandum, attached hereto as Attachment A. In 2004, the same organization submitted a criminal complaint to then-Attorney General John Ashcroft seeking the investigation and prosecution of U.S. officials implicated in the torture of detainees, including against Mr. Ashcroft for his role in rendering Mr. Arar to torture in Syria. See Letter from Morton Sklar to John Ashcroft (June 26, 2004), attached hereto as Attachment B. I have been informed by Human Rights USA that other than a cursory response acknowledging receipt of its 2004 complaint, it has never received any

response from the Department of Justice.

I respectfully request that my letter along with the attachments be included in the Congressional Record as an appendix to the October 18, 2007 Hearing submissions. We look forward to your pursuing this matter, and are available to provide any assistance to your efforts to expose the truth, hold accountable those who are responsible, and prevent what happened to Mr. Arar from happening again.

Sincerely,

A handwritten signature in cursive script that reads "Maria C. LaHood". The signature is written in black ink and is positioned to the right of the typed name.

Maria C. LaHood

Encls.

# **ATTACHMENT A**



# WORLD ORGANIZATION FOR HUMAN RIGHTS USA

Formerly the World Organization Against Torture USA

Morton Sklar, Executive Director

July 13, 2006

The Honorable Alberto Gonzales  
United States Department of Justice  
Robert F. Kennedy Building  
950 Constitution Avenue, N.W.  
Washington, D.C. 20530

**Re: Request for Appointment of an Independent Counsel to Investigate and Prosecute the Crimes Associated with "Extraordinary Renditions"**

Dear Attorney General Gonzales:

The World Organization for Human Rights USA urges the United States Department of Justice to immediately seek appointment of an independent counsel, pursuant to the provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-599, to investigate and prosecute any and all criminal acts committed by any person involved in rendering, or conspiring to render, suspected terrorism detainees to other countries for interrogation by torture or other cruel, inhumane, or degrading treatment. Recent reports documenting the involvement of United States officials, employees, and contractors in the practice of "extraordinary renditions," or renditions to torture, suggest that serious felonies under federal law have been committed, including torture (18 U.S.C. §§ 2340-2340A), conspiracy to commit torture (18 U.S.C. § 2340A(c)), kidnapping (18 U.S.C. § 1201), aggravated sexual abuse (18 U.S.C. § 2241), and aggravated assault (18 U.S.C. § 113). All of these abuses must be investigated vigorously in the interests of justice and the rule of law, principles that serve as the cornerstone of U.S. policy both domestically and abroad. Any delay in appointing an independent counsel frustrates the timely collection of evidence and identification of witnesses, jeopardizing the potential for the type of robust and thorough investigation that is required for such grave crimes.

We are bringing these allegations to your attention with the expectation that the United States Government will properly carry out its responsibilities under domestic and international law, thereby making it unnecessary to resort to international judicial processes to secure justice and accountability. Ignoring these crimes would undermine the domestic criminal justice system and the balance of powers created by the Constitution. Failure to fully investigate and prosecute these crimes would also violate the United States' obligations under the Extradition Treaty between the Government of the United States and the Government of the Republic of Italy, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the

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Websites: [www.humanrightsus.org](http://www.humanrightsus.org), [www.criminalaccountability.com](http://www.criminalaccountability.com) and [www.woatusa.org](http://www.woatusa.org).

The World Organization for Human Rights USA (or Human Rights USA for short) is an independent, affiliated national member of the International World Organization Against Torture and SOS Torture Networks.

International Covenant on Civil and Political Rights, numerous other treaty standards binding on the United States, and customary international law prohibiting arbitrary indefinite detention and torture. As important, failing to apply the rule of law to these practices would further undermine the United States' credibility as a leading supporter of the effective observance of human rights standards worldwide.

Attached is a legal memorandum explaining in detail the violations and abuses that have taken place, and the necessity to properly investigate and prosecute them under United States law. Consistent with the provisions of 28 U.S.C. § 591(d)(2), we anticipate receiving within 30 days (1) notice of your written recusal, as well as the recusal of any other Department of Justice personnel involved in designing or implementing the torture policies or rendition to torture program, and (2) that the Department of Justice has found the herein referenced information specific and credible evidence that an investigation into these criminal violations is in the interest of justice, requiring an immediate application to the Special Division of the Federal Court of Appeals for the District of Columbia Circuit for appointment of an independent counsel, under the provisions of 28 U.S.C. §§ 591-599.

Since information regarding these abuses has been publicly available for some time, we also would appreciate your providing us with any information you may have as to whether the Department of Justice may have already initiated the any type of investigation on these matters, or has conducted any other type of fact-finding or legal analysis that might be relevant to the issues covered in this complaint. If any such inquiry or analysis has taken place, we also request that you provide us with any findings or conclusions that may have resulted.

We look forward to your reply, and stand ready to assist the preliminary investigation, and the independent counsel when appointed, in any way possible.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Morton Sklar".

Morton Sklar, Executive Director  
Theresa Harris, Legal Intern

**LEGAL MEMORANDUM IN SUPPORT OF THE REQUEST FOR APPOINTMENT OF  
AN INDEPENDENT COUNSEL TO INVESTIGATE AND PROSECUTE CRIMES  
ASSOCIATED WITH THE POLICY OF “RENDITION TO TORTURE”**

The World Organization for Human Rights USA urges the United States Department of Justice to immediately seek appointment of an independent counsel, pursuant to the provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-599 (2006), to investigate and prosecute any and all criminal acts committed by any person involved in rendering, or conspiring to render, suspected terrorist detainees to other countries for interrogation by torture or other cruel, inhumane, or degrading treatment. Recent reports documenting the involvement of United States officials, employees, and contractors in the practice of “extraordinary renditions,” or renditions to torture, suggest that serious federal felonies have been committed, including torture (18 U.S.C. §§ 2340-2340A), conspiracy to commit torture (18 U.S.C. § 2340A(c)), kidnapping (18 U.S.C. § 1201), aggravated sexual abuse (18 U.S.C. § 2241), and aggravated assault (18 U.S.C. § 113). All of these abuses must be investigated vigorously in the interests of justice and the rule of law, principles that serve as the cornerstone of United States policy both domestically and abroad. Any delay in appointing an independent counsel frustrates the timely collection of evidence and identification of witnesses, jeopardizing the potential for the type of robust and thorough investigation that is required for such grave crimes.

The United States Government has the responsibility to investigate and prosecute these allegations under both domestic and international law. Ignoring these crimes would undermine the domestic criminal justice system and the balance of powers created by the Constitution. Failure to fully investigate and prosecute these crimes would also violate the United States’ obligations under the Extradition Treaty between the Government of the United States and the Government of the Republic of Italy, the Convention Against Torture and Other Cruel, Inhuman

or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, numerous other treaty standards binding on the United States, and customary international law prohibiting arbitrary indefinite detention and torture. As important, failing to apply the rule of law to these practices would further undermine the United States' credibility as a leading supporter of the effective observance of human rights standards worldwide.

**I. FEDERAL LAWS AND THE DEPARTMENT OF JUSTICE'S REGULATIONS REQUIRE AN INDEPENDENT COUNSEL TO INVESTIGATE AND PROSECUTE THE CRIMINAL ALLEGATIONS ASSOCIATED WITH UNLAWFUL RENDITIONS TO TORTURE.**

Ongoing inquiries by foreign prosecutors, governments, and international organizations have produced compelling evidence that United States government officials, acting unlawfully but under color of law, planned, authorized, and participated in the unlawful transfer of detainees suspected of terrorism to other countries, outside the protections of United States law, for interrogation through torture and other inhumane methods. The arrest warrants and reports generated by these inquiries suggest that this Central Intelligence Agency program, often referred to as "extraordinary renditions," or "renditions to torture," and numerous individual acts committed in furtherance of it, violate United States criminal laws. This information obliges the Attorney General to pursue criminal investigation and prosecution in the United States.

Since the high-level officials in the Department of Justice, as well as officials in the White House and in other Departments and agencies in the intelligence community with which it collaborates, are among the persons these reports allege collaborated in committing the crimes in question, or in shielding them from prosecution, only a genuinely independent inquiry can fulfill the United States' obligations to properly investigate these accusations. The process outlined in 28 U.S.C. §§ 591-599 was created for precisely these types of allegations as an essential safeguard to preserve the constitutional balance of powers and to prevent high-level members of

the Executive Branch from helping their colleagues avoid criminal charges. In adopting this law, Congress recognized that a judicially appointed, outside counsel is the most effective way to ensure that investigations of allegations of crimes by officers of the Executive Branch are properly conducted, and that they are carried out with the fullest independence possible, avoiding potential interference from other government officials who might be implicated by the investigation, or any implication of improper influence. Congress further understood that when criminal allegations are made against high-ranking government officials, a thorough, fair outside investigation is essential to sustain public confidence that one of the indispensable principles of American democracy, namely that no one is above the law, is being properly observed. The mounting evidence of criminal activities provided by survivors of the extraordinary rendition program, foreign prosecutors, foreign government inquiries, international human rights monitoring bodies, and non-governmental organizations makes it necessary for the Department of Justice to follow Congress' instructions and apply to the courts for a thorough investigation and prosecution of these abuses, free from even the appearance of political interference, to uphold this nation's commitment to justice and the rule of law.

Under 28 U.S.C. §§ 591-599, the Attorney General is obliged to conduct a preliminary investigation to determine whether an independent counsel is necessary to prevent a miscarriage of justice when three factors are present: (1) the Attorney General receives allegations that a federal felony has been committed, (2) the crime is alleged to have been committed by certain high-ranking government officials enumerated in the statute<sup>1</sup>, and (3) the information provided to the Attorney General is specific and originates from a credible source. In addition to this

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<sup>1</sup> The list referred to in 28 U.S.C. § 591 includes the President and Vice-President of the United States, Secretary of State, Secretary of Defense, Attorney General, Secretary of Homeland Security, Director of National Intelligence, the Director and Deputy Director of the Central Intelligence Agency, and other similarly high-ranking officers of the Executive Branch.

requirement, the statute also authorizes the Attorney General to request court appointment of an independent counsel to investigate similar allegations against other, lower-level officers, such as the CIA officers implicated in the renditions program, when it would be in the public interest to do so.<sup>2</sup> If the preliminary investigation supports a reasonable belief that further investigation is warranted, or if the preliminary investigation does not come to a conclusion within 90 days, then the statute requires that the Attorney General apply to the Special Division of the Federal Court of Appeals for the District of Columbia Circuit for appointment of an independent counsel.<sup>3</sup>

As explained in the following sections, currently available reports on renditions to torture satisfy all three of these threshold requirements, making a preliminary investigation necessary under the law. These reports allege serious federal crimes, committed by high-ranking government officials and other government agents. Specific, corroborated evidence of precise locations, dates, times, descriptions of suspects, other details of how the crimes were carried out, and in at least one case, the names of 26 alleged perpetrators, support the allegations. The credible sources bringing this information to light include the Milan, Italy public prosecutor's office, an Italian criminal court, Italian law enforcement investigations, the European Parliament, the Council of Europe, the United Nations Special Rapporteur on Torture, the New York University Center for Human Rights and Global Justice, Human Rights Watch, Amnesty International, the Washington Post, the New York Times, the Boston Globe, the British Broadcasting Corporation, and The New Yorker magazine. Taken as a whole, this specific and credible evidence alleging the involvement of Executive Branch authorities in the commission of felonies obligates the Justice Department under the law to conduct the preliminary investigation required by statute.

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<sup>2</sup> 28 U.S.C. § 591(c).

<sup>3</sup> 28 U.S.C. §§ 591(d)(2), 592(c).

**A. The Corroborated Statements of Khaled El-Masri, Maher Arar, and Osama Mustafa Hassan Nasr Indicate That They, and Other as Yet Unknown Individuals, Were Illegally Transferred to Other Countries for the Purpose of Torture and Other Crimes.**

The first element required for appointment of an independent counsel is that the available evidence must allege commission of a federal felony. The facts presented by the substantiated narratives of German citizen Khaled El-Masri, Canadian citizen Maher Arar, and Italian asylee Osama Mustafa Hassan Nasr, present a prima facie case that these men were the victims of multiple felony crimes. When these three cases are put into context with the additional documentation of the “extraordinary rendition” program generated by foreign prosecutors, international organizations, the media, and non-governmental organizations, the totality of the information now available suggests that these men’s experiences are not isolated, but that many more detainees have been similarly victimized. This section summarizes the reports of criminal acts these detainees have suffered at the hands of, or at the direction or with the acquiescence of, United States nationals and/or employees. Specific sections of federal criminal code under which the perpetrators of these and other similar but yet undocumented crimes should be investigated and prosecuted are then enumerated.

**1. *Summaries of Sample Cases of Rendition to Torture Currently Under Investigation by Foreign Officials and International Organizations.***

***Khaled El-Masri.***<sup>4</sup> German citizen Khaled El-Masri was traveling by bus to Macedonia on New Year’s Eve 2003, when border guards took him into custody without explanation. This

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<sup>4</sup> The facts presented here regarding Khaled El-Masri’s arbitrary detention and torture are compiled from the following sources: Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. (Resolution P6\_TA-PROV(2006) 0316, adopted July 6, 2006); Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States, Report by the Committee on Legal Affairs and Human Rights, EUR. PARL. ASS. (June 12, 2006); Amnesty International, *Partners in Crime: Europe’s Role in US Renditions* (June 2006); Amnesty International, *Below the Radar: Secret flights to torture and “disappearance”* (Apr. 2006); *El-Masri v. Tenet*, complaint filed in the US District Court, Eastern District of Virginia, Dec. 6, 2005; Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year after Rasul v. Bush* (June 2005); *Innocent German Beaten by US*

abduction began almost five months of torture, aggravated assault, and sexual assault. The most egregious abuse occurred after 23 days of arbitrary detention and interrogation, when he was transferred from the hotel in Skopje, Macedonia where he had been held since his abduction to a prison in Afghanistan.

On January 23, 2004, El-Masri was first taken to an airbase in Afghanistan where his captors blindfolded him, then sliced off his clothes until he was naked, beat him severely, and sodomized him. Based on the sounds around him, El-Masri believes that someone was taking pictures as he was abused. This ordeal subjected El-Masri to severe physical and psychological abuse, as well as severe humiliation and degradation.

Still blindfolded, the men plugged El-Masri's ears and put headphones over them, placed a bag over his head, chained his hands to a belt around his waist, shackled his ankles, and put something over his nose that made it difficult for him to breathe, causing him to panic. They forced El-Masri first into a car and then a plane, nearly dislocating his shoulder in the process. Thrown onto the floor of the plane, the men then chained El-Masri, spread-eagled, to the inside of the plane, which caused him great pain for some time afterward. During the flight, he was injected in both arms with a drug that made him mostly unconscious during the flight. Upon landing, men threw El-Masri into what felt like the trunk of a car, and then dragged him out of the car and down a flight of stairs, pushing and shoving him against the walls along the way. He was then thrown to the ground, beaten, and kicked in the head.

El-Masri had been transferred to the "Salt Pit," a CIA-controlled detention facility in Bagram, Afghanistan. He was held for four months in a small, cold, dark, filthy concrete cell

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*jailers*, SYDNEY MORNING HERALD, Apr. 25, 2005; Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions* (Mar. 2005); James Meek, *They Beat Me from All Sides*, GUARDIAN (London), Jan. 14, 2005, at 2; Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long history of tactics in overseas prisons is coming to light*, WASH. POST, May 11, 2003, A1; Human Rights Watch, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan* (2004).

with no bed. The only water available was a dirty plastic bottle with foul-smelling, greenish-brown water in it that made El-Masri vomit when he tried to drink it. El-Masri's continuous requests to speak with German officials were rebuffed, with one interrogator telling El-Masri that "I was in a land where there were no laws, and that nobody knew I was there." The daily interrogations always involved threats, insults, pushing, and shoving.

Several of the interrogators and one of the prison directors identified themselves to El-Masri as Americans and El-Masri noted that many of his interrogators only spoke English. El-Masri also noted the prevalence of American products throughout the Afghan prison. Air traffic logs from both the FAA and European counterpart agency indicate that El-Masri was transported in American planes.

At one point during his detention, hooded men forced El-Masri from his cell, bound his hands and feet, dragged him to an interrogation room, and tied him to a chair. The men then grabbed his head, stuffed a tube up his nose and force-fed him by pumping liquid directly into his stomach. The force-feeding caused El-Masri extreme pain and suffering, requiring several days of medical care.

After four months of arbitrary detention in Afghanistan, without ever having been charged with a crime, El-Masri was bundled into a minivan and driven to a dark, isolated place in the mountains along the Albanian border where he was unloaded, had his blindfold and handcuffs removed, and told to walk down the path ahead without looking back. El-Masri feared that he would be shot in the back as he walked away and left to die. Instead, El-Masri arrived at a border gate where Albanian guards took him into custody and returned him to Germany. Because El-Masri had lost about 60 pounds and had long, unkempt hair and a long beard as a

result of his detention, customs officials at Frankfurt International Airport had difficulty-identifying El-Masri by his passport picture.

In June 2006, the German parliament held hearings on the involvement of German government officials in the arbitrary detention and torture of El-Masri. Those testifying at the hearings included El-Masri, a telecommunications worker who reported El-Masri's abduction to the German embassy in Macedonia and was told "we know about the case," German foreign ministry officers, and Munich prosecutor Martin Hofmann. The panel's conclusions and recommendations are forthcoming, and Hofmann's investigation continues.<sup>5</sup>

***Maher Arar.***<sup>6</sup> Like Khaled El-Masri, Maher Arar was detained on suspicion of terrorism, sent to another country where he was interrogated and tortured, and then released without ever having a single charge brought against him. But in Arar's case, he was seized in the United States by U.S. authorities. On September 26, 2002, Immigration and Naturalization Service agents at John F. Kennedy Airport in New York chained and shackled Arar, without charge, even though Arar was only changing planes on his way home to Canada and not trying to enter the United States. After further interrogation at JFK Airport by Federal Bureau of Investigation agents, he was moved to a federal detention facility in Brooklyn. J. Scott Blackman, then the Director of the Eastern Regional Office of the Immigration and Naturalization Service, ignored

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<sup>5</sup> Claudia Rach, *German Citizen's Abduction by CIA is Credible, Prosecutor Says*, BLOOMBERG NEWS, June 22, 2006; *El-Masri Testifies Before German Parliament*, DER SPIEGEL, June 23, 2006.

<sup>6</sup> The facts presented here regarding Maher Arar's arbitrary detention and rendition to Syria are compiled from: Stephen J. Toope, Fact Finder's Report to the Canadian Government Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *available at* <http://www.ararcommission.ca/eng/17.htm>, (last visited July 9, 2006); Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. (Resolution P6\_TA-PROV(2006) 0316, adopted July 6, 2006); Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States, Report by the Committee on Legal Affairs and Human Rights, EUR. PARL. ASS. (June 12, 2006); Amnesty International, *Partners in Crime: Europe's Role in US Renditions* (June 2006); Amnesty International, *Below the Radar: Secret flights to torture and "disappearance"* (Apr. 2006); Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year after Rasul v. Bush* (June 2005); *Arar v. Ashcroft*, complaint filed in the U.S. District Court, Southern District of New York, Mar. 1, 2005; Jane Mayer, *Outsourcing Torture: The secret history of America's "extraordinary rendition" program*, NEW YORKER, Feb. 14, 2005; *His Year in Hell*, CBS SIXTY MINUTES II, aired Jan. 24, 2004.

Arar's pleas not to remove him to Syria because he feared torture there and had not lived there for many years. Instead of sending Arar to Canada, the country where Arar held dual citizenship and lived with his family, Blackman issued a determination that Arar should be removed to Syria. Then-Acting Deputy Attorney General Larry D. Thompson subsequently ordered Arar's removal to Syria.

On October 8, 2002, without any opportunity to appeal the administrative findings of the INS or DOJ ordering his removal, Arar was taken to a small airfield in Washington, DC, put on a private airplane, and flown to Amman, Jordan. United States officials handed Arar over to Jordanian authorities, who interrogated him and beat him. The next day, the Jordanian authorities transferred Arar to Syrian officials, who detained him for the next ten months in the infamous Palestine Branch of Syrian Military Intelligence, noted in the State Department's own reports for the pervasive use of torture:

“The branches of the security services operate independently of each other and outside the legal system. Their members commit serious human rights abuses ... Despite the existence of constitutional provisions and several Penal Code penalties for abusers, there was credible evidence that security forces continued to use torture, although to a lesser extent than in previous years. Former prisoners and detainees report that torture methods include administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine ... Although torture occurs in prisons, torture is most likely to occur while detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices.”<sup>7</sup>

While in detention, Syrian interrogators regularly subjected Arar to physical and psychological torture. He was hit on the palms, hips, and lower back with a two-inch thick electrical cable, and punched in the stomach, face, and back of the neck. Guards also put Arar in

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<sup>7</sup> U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2001: SYRIA.

certain cells to force him to listen to the screams of other prisoners being tortured and threatened to hang him upside down from a tire and shock him with electricity.

This torture was committed in conjunction with 18-hour long interrogation sessions, during which guards asked Arar questions remarkably consistent with those of the INS and FBI agents in New York. After Syrian interrogators repeatedly questioned him about the same specific individuals on whom the American authorities' questions had focused, Arar came to the reasonable conclusion that the Syrian torturers were cooperating with the American agents to get information from him. This conclusion is supported by at least one media report in which a Syrian official confirmed that the Syrian government shared with United States officials the "information" gained from interrogating Arar.<sup>8</sup>

On October 5, 2003, more than a year after he first was detained at JFK airport, the Syrian Supreme State Security Court released Arar to the Canadian consulate without any charges being filed against him. Syria's highest ranking diplomat in the United States, Imad Moustapha, has stated that the Syrian government could not find any evidence that Arar committed any kind of crime and that it considers Arar completely innocent.<sup>9</sup>

On February 5, 2004, the Canadian government opened a Commission of Inquiry into the involvement of Canadian officials in Arar's detention and removal to Syria, appointing as Commissioner of the Inquiry The Honorable Dennis R. O'Connor, Associate Chief Justice of Ontario. The Fact Finder's Report on Arar's treatment in Jordan and Syria, submitted to the Commission on October 27, 2005, concluded, "Maher Arar was subjected to torture in Syria."<sup>10</sup>

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<sup>8</sup> *His Year in Hell*, CBS's SIXTY MINUTES II, aired Jan. 24, 2004.

<sup>9</sup> *Id.*

<sup>10</sup> Press release, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Commissioner Dennis O'Connor Releases the Fact Finder's Report on Maher Arar's Treatment in Jordan and Syria (Oct. 27, 2005), available at [http://www.ararcommission.ca/eng/ReleaseFinal\\_oct27.pdf](http://www.ararcommission.ca/eng/ReleaseFinal_oct27.pdf) (last visited July 9, 2006).

Commissioner O'Connor recently announced that he anticipates releasing the report at the end of the summer of 2006.<sup>11</sup>

*Osama Mustafa Hassan Nasr.*<sup>12</sup> On February 17, 2003, Osama Mustafa Hassan Nasr (also known as Abu Omar) disappeared from the streets of Milan, Italy. More than a year later, in one of very few phone calls he has been able to make since he was abducted, Nasr told his wife, Nabila Ghali, that he was stopped in the street by Italian-speaking men who identified themselves as police and demanded his identification. The men then sprayed something on his mouth and nose, forced him into a van, and taped his mouth. The van drove him about five hours away from Milan. An eyewitness to Nasr's abduction corroborated his story, informing Milan prosecutor Armando Spataro and officers of the General Investigation and Special Operations Division (*Divisione Investigazioni Generali e Operazioni Speciali* – DIGOS) that she saw "two Western-dressed men attack a bearded Arab, dressed in a white jalabia, who struggled and cried for help while being violently grabbed and forcibly made to enter a van."

Nasr also described his abduction to his friend in Milan, Elbadry Mohammed Reda, in a second phone call in 2004. In a statement given to prosecutor Spataro on June 15, 2005, Reda said that Nasr told him he saw US military aircraft when he was let out of the van. This observation corresponds to the findings of the ongoing Italian investigation into Nasr's abduction

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<sup>11</sup> Press release, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Arar Commission Reports Expected to Be Released By End of Summer (Apr. 11, 2006), *available at* [http://www.ararcommission.ca/eng/release\\_0411e.pdf](http://www.ararcommission.ca/eng/release_0411e.pdf), (last visited July 9, 2006).

<sup>12</sup> The facts presented here regarding the abduction and torture of Nasr are compiled from the Arrest Warrant of July 20, 2005, Tribunale Ordinario di Milano, Section XI Criminal Court as Review Judge, No. 1413/2005 RG TRD, 24-25, 31; Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. (Resolution P6\_TA-PROV(2006) 0316, adopted July 6, 2006); Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States, Report by the Committee on Legal Affairs and Human Rights, EUR. PARL. ASS. (June 12, 2006); Amnesty International, *Partners in Crime: Europe's Role in US Renditions*, June 2006; Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year after Rasul v. Bush* (June 2005), John Crewdson, Tom Hundley, & Liz Sly, *Italy Charges CIA Agents*, CHICAGO TRIBUNE, June 25, 2005; Gordon Edes, *CIA uses Jet, Red Sox Partner Confirms*, BOSTON GLOBE, Mar. 21, 2005; Tracy Wilkinson & Bob Drogin, *Missing Imam's Trail Said to Lead from Italy to CIA; Prosecutors in Milan are investigating whether an Egyptian-born suspected militant was spirited away by the U.S. using a disputed tactic*, L.A. TIMES, Mar. 3, 2005, at A1.

that he was taken to the joint US/Italian airbase in Aviano, Italy. Nasr told Reda that he was beaten at this airbase by men who interrogated him in English and Italian.

From Aviano, air traffic records indicate Nasr was then flown on a Learjet LJ-35, registered with the FAA as SPAR-92, to the headquarters of US Air Forces in Europe, Ramstein airbase in Germany. According to media reports, this plane was commonly used by the United States military to transport senior officers and civilian VIPs. At Ramstein, Nasr was transferred to a private Gulfstream IV jet (registered with the FAA as N85VM), owned by Phillip Morse, a United States citizen, and chartered by Richmor Aviation. From Ramstein, this plane delivered Nasr to Cairo, Egypt, the very country from which Italy had granted Nasr asylum based on his credible fear of torture there, making the transfer a per se violation of the absolute prohibition in Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment that no one be sent to a situation of likely torture.<sup>13</sup>

According to Reda's statement to the police, Egyptian interrogators subjected Nasr to extreme forms of torture. They forced him to endure noises so loud they damaged his hearing. He was exposed to extreme temperatures, a form of torture known as "environmental manipulation," placed first in a very hot sauna and then immediately in a cold storage room. He was hung upside down and shocked with live electrical wires on sensitive parts of his body including his genitals. Nasr later told Reda that this torture caused extreme pain throughout his body, paralysis, severe damage to his motor and urinary systems, and incontinence. In a phone

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<sup>13</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113, 114, 24 I.L.M. 535 (1985).

call recorded by Italian investigators<sup>14</sup>, Nasr told said that he had been released from detention in Egypt on April 20, 2004, because of the physical damage he suffered.<sup>15</sup>

Italian prosecutor Spataro's investigation identified a number of Americans who were involved in Nasr's abduction and torture by tracing mobile phone records for calls made in the area where Nasr was abducted. These records show that the abduction was planned at least two months in advance, and confirm that Nasr was taken to Aviano airbase. As a result of Spataro's inquiry, Italian courts have issued arrest warrants for 26 Americans to stand trial in Italy. An Italian judge also issued "European arrest warrants" for 22 of these American suspects, authorizing any European Union country to detain them and extradite them to Italy for trial. In January 2006, following the issuance of the first 22 arrest warrants, Italian Justice Minister Roberto Castelli authorized international assistance for the Milan prosecutors, clearing the prosecutors to question suspects and witnesses in the United States. But in April 2006, Castelli refused to formally request extradition of the suspects from the United States government. Minister Castelli was part of the Italian administration voted out of office in May, and the new administration is expected to implement the court warrants.

***Other Individuals Rendered to Torture by the United States.*** The cases detailed here are only three examples of the numerous criminal acts likely to have been committed in connection with the United States' rendition to torture program. These three cases have led to international investigations by prosecutors and legislatures in Germany, Canada, and Italy. But many other cases have been documented, and many more are suspected to have taken place based on

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<sup>14</sup> Italian authorities were investigating Nasr on suspected terrorist activities when he disappeared. Officials with the Milan prosecutor's office have stated that Nasr's disappearance undermined a promising investigation. On June 23, 2005, an Italian judge indicted Nasr on multiple terrorism-related charges.

<sup>15</sup> Nasr was re-arrested on May 12, 2004 and taken to a prison in Alexandria. His wife was able to visit him there on February 21, 2005, but three days later she was told that he had been moved to Cairo.

credible evidence.<sup>16</sup> In 2004, Human Rights First interviewed many detainees held by the United States in detention centers in Afghanistan, Iraq, Guantánamo Bay, Jordan, and Pakistan, and documented that other detainees previously thought to have “disappeared” were being held in those facilities.<sup>17</sup> Specific, documented examples of other individuals rendered to torture include<sup>18</sup>:

- **Laid Saidi**, an Algerian national, was detained by Tanzanian authorities in May 2003, and handed over to United States officials who then transferred Saidi to the “Salt Pit” in Afghanistan, where he was held with Khaled El-Masri. After 16 months during which he claims he was interrogated and abused in a manner consistent with the events related by El-Masri, Saidi was released in Algeria without charge.
- **Mustafa Ait Idir, Belkacem Bensayah, Hadj Boudellaa, Saber Lahmer, Lakhdar Boumediene, and Mohamed Nechle**, Bosnian citizens and residents, were handed over to United States authorities by Federation of Bosnia and Herzegovina police on January 18, 2002, the day after that country’s Supreme Court had ordered their release upon finding insufficient evidence to continue their detention, allegedly requested by the United States, for suspected terrorist involvement. These men were transferred to United States military bases in Sarajevo, then via Turkey to Guantánamo Bay, where the men are still detained

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<sup>16</sup> See Jane Mayer, *Outsourcing Torture: The secret history of America’s “extraordinary rendition” program*, NEW YORKER, Feb. 14, 2005.

<sup>17</sup> Human Rights First, *Behind the Wire* (Mar. 2005).

<sup>18</sup> The facts presented here are compiled from the following sources: Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. (Resolution P6\_TA-PROV(2006) 0316, adopted July 6, 2006); Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States, Report by the Committee on Legal Affairs and Human Rights, EUR. PARL. ASS. (June 12, 2006); Amnesty International, *Partners in Crime: Europe’s Role in US Renditions* (June 2006); Craig S. Smith & Souad Mehkennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006.

without charge. All of these men were arbitrarily detained, and at least one of them has reportedly been tortured.

- ***Muhammad Haydar Zammar***, a German national, was detained while traveling in Morocco in December 2001. After several weeks of detention without charge in Morocco, Zammar was reportedly transferred to Syria and allegedly tortured there. He has effectively “disappeared” as his current location and condition are unknown.
- ***Ahmed Agiza and Mohammed El Zari***, Egyptian nationals seeking asylum in Sweden, were detained in Sweden in December 2001, transferred to United States custody, and flown on a CIA plane to Egypt, where they were held incommunicado and tortured. In October 2003, Mohammed El Zari was released from a prison in Cairo without charge; Ahmed Agiza remains in prison in Egypt. In May 2005, the United Nations Committee against Torture called their arbitrary arrest and transfer to Egypt “at least” cruel, inhuman or degrading treatment, if not a more serious form of torture.
- ***Bisher Al-Rawi and Jamil El-Banna***, residents of the United Kingdom, were detained in Gambia by Gambian intelligence agents in 2002 and subsequently turned over to United States agents for questioning. The United States authorities held Al-Rawi and El-Banna incommunicado for over a month, during which time they were reportedly threatened with assault and rape. The men were eventually transferred to the United States airbase at Bagram, Afghanistan, where they were held for about a month, then flown to the United States naval base at Guantánamo Bay, where they are still held without charge.

Based on the information available from these cases, as well as the credible reports concluding that the program has involved the transfer of at least 70 and possibly over a thousand people, it is reasonable to assume that similar abuses and crimes have been committed against

these and many other as yet unknown detainees who have been subjected to the policy of rendition to torture.

**2. *Federal Criminal Violations Raised by the Cases of Persons Rendered to Interrogation by Torture.***

In the documented cases presented above, the United States abducted and arbitrarily detained people on flimsy reports of possible ties to terrorism without corroboration by more concrete evidence, and without any lawful hearings or proceedings taking place.<sup>19</sup> United States officials then transferred these men for interrogation by authorities in countries where intelligence operatives are notorious for using torture to coerce confessions. By doing so, the officials who designed the rendition to torture program, authorized its implementation, ordered its application in specific cases, and carried out the actual torture abuses, as well as other officials who turned a blind eye to these unlawful practices, all appear to bear some criminal liability for the felony crimes committed against these men.<sup>20</sup> To allow these crimes to go unpunished would undermine Americans' trust in their justice system, especially in the fundamental value that even the most powerful government officials cannot operate above the rule of law.

***Torture (18 U.S.C. § 2340-2340A).*** A person commits the crime of torture when, acting under the color of law, he or she inflicts severe physical or mental pain or suffering on another person within his or her custody or physical control, with specific intent to do so, outside of the

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<sup>19</sup> Secretary of State Rice reportedly personally ordered Khaled El-Masri's release when his detention was found to be an error. See David Johnston & Don Van Natta, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. TIMES, Apr. 23, 2005. Laid Saidi claims that he was released when, after 16 months of detention, United States authorities finally realized that they had detained him on the mistranslation of a recorded telephone call in which Saidi had mentioned "tires" instead of the similar sounding word in Arabic for "airplanes." See Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006.

<sup>20</sup> See Ass'n of the Bar of the City of New York, Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* (Oct. 2004), at 102-119 (applying the same criminal statutes discussed here to the rendition to torture program generally, and concluding that the defenses of necessity, self-defense, defense of others, and superior orders are most likely inapplicable should criminal charges be brought).

United States. Federal courts have jurisdiction under this statute to try both aliens and United States citizens and residents who commit torture abroad if they are found in the United States. If convicted, potential penalties include fines and/or up to 20 years imprisonment. If the torture results in death, the perpetrator can be sentenced to life imprisonment or the death penalty.

The former detainees whose cases are discussed above experienced abuse that meets the statutory definition of torture during their interrogations in other countries. The detainees suffered severe beatings, sexual abuse, electric shock, deafening noises, extreme temperatures, denial of basic human necessities like food and water, threats of violence, rape, and execution, drugging, and extended solitary confinement. These severe physical and psychological abuses were specifically intended by their perpetrators to break down the detainees and coerce them to confess to suspected involvement in terrorist activities and to provide information about others.

All of these abuses were carried out by persons acting under color of law, and they occurred outside the United States, as required by the statute. The reports available on specific detainees document that many of the abuses were carried out while the victims were in American custody and control. For example, Khaled El-Masri identifies one of the prison directors and some of the interrogators as Americans based on their accents and statements made by those persons, as well as items in the prison that bore American trademark symbols. United States citizens, namely the CIA team carrying out the renditions, are implicated in these abuses that constitute crimes of torture under the statute.

*Conspiracy to Commit Torture (18 U.S.C. § 2340A(c)).* Conspiracy to commit torture is also a federal crime, held by the law to be just as serious a criminal offense as the commission of torture itself. The perpetrator need not commit the act of torture him or herself, so long as the intent to further or assist in the commission of torture, or command or counsel that it be done,

exists. The federal statute criminalizing conspiracy to commit torture applies the same definition as applies to the crime of torture, and establishes the same potential sentences for violation of the law.

As evidenced by the facts presented by the cases of El-Masri, Arar, and Nasr, the rendition to torture program appears to constitute a well-organized conspiracy, designed on American shores by United States government officials and approved at the highest levels of the Executive Branch, directing the commission of crimes outside the United States. On its face, the conspiracy also appears to involve officials from European governments who took suspects into custody, knowingly allowed unlawful renditions to take place in their territories, and/or permitted use of their airspace or airports for these unlawful purposes.<sup>21</sup> The specific and credible evidence suggests that at least some of the conspirators fully intended their scheme to result in the commission of torture and other violent crimes since the entire purpose of the rendition to torture program is to deliver detainees to foreign security agencies so that “harsh” interrogations of suspected terrorists can take place. The reality of this problem received additional confirmation on July 6, 2006, when an Italian court issued arrest warrants for two high-ranking officers in the Italian intelligence agency for complicity in Nasr’s kidnapping by CIA operatives.<sup>22</sup> To give the federal law prohibiting conspiracy to commit torture full effect and prevent the fostering of a culture of impunity, investigation and prosecution must not be limited to the CIA agents and other personnel who executed the kidnappings and renditions, but

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<sup>21</sup> The European Parliament recently adopted this conclusion by resolution: Interim Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. (Resolution P6\_TA-PROV(2006) 0316, adopted July 6, 2006).

<sup>22</sup> See Stephen Grey & Elisabetta Povoledo, *Twists in a CIA Case Keep Italians Riveted*, INT’L HERALD TRIBUNE, July 10, 2006 (reporting that court documents supporting the arrest warrants state the two indicted Italian agents were recorded saying that “Yankee” investigators had asked them to “identify and check out” Nasr and that they knew the Americans wanted to “seize” Nasr illegally).

must include those at the highest levels who themselves planned and ordered the torture of these detainees. All of these individuals have violated 18 U.S.C. § 2340A.

*Crimes Committed within the Special Maritime and Territorial Jurisdiction of the United States (18 U.S.C. § 7(9)).* The USA PATRIOT Act of 2001, as amended in 2005, expanded the reach of the federal courts to provide jurisdiction for certain crimes committed on lands, buildings, or facilities designated for use by the United States government, such as detention centers. Other sections of the Special Maritime and Territorial Jurisdiction Act (18 U.S.C. § 7) that may be relevant to the rendition to torture abuses give the federal courts jurisdiction over crimes committed on ships controlled by or registered in the United States when on the high seas, and airplanes flying over United States or international airspace, including those under private ownership by nationals of the United States. When a United States national commits assault (18 U.S.C. § 113(a)), maiming (18 U.S.C. § 114), murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), kidnapping (18 U.S.C. § 1201), aggravated sexual abuse (18 U.S.C. § 2241), or sexual abuse (18 U.S.C. § 2242) within the special maritime and territorial jurisdiction of the United States, that person is subject to prosecution in federal courts.<sup>23</sup> The statutory penalties for assault with intent to commit any felony except murder are a monetary fine and/or up to ten years imprisonment.

Several provisions of this statute may apply to the abuses suffered by victims of the rendition to torture program. One can reasonably conclude from El-Masri's personal statement and the corroborating evidence produced by his counsel that he was abused and drugged by United States nationals on an airplane registered in the United States, tortured and/or assaulted in a detention facility under CIA control, and abused in vehicles operated and controlled by United

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<sup>23</sup> Federal statute 18 U.S.C. § 7 gives federal jurisdiction to a longer list of criminal violations. The crimes cited here are provided as the most likely to have been committed through "extraordinary renditions" based on the information currently available.

States nationals during transport between sites. He was also sodomized at what appears to be a facility controlled by the United States. At a minimum, this abuse amounts to assault and aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States and should be prosecuted under these statutes. Such prosecution would not be unprecedented. The Department of Justice has indicted a former CIA contractor for similar abuse of a detainee during interrogations in Afghanistan, unrelated to the rendition to torture program.<sup>24</sup>

While the abuses suffered by El-Masri, Arar, and Nasr at United States facilities would best be described as torture and assault, these are only three of numerous people who have been rendered to torture. Given the very recent revelations of another detainee held with El-Masri at the CIA detention facility in Afghanistan, as well as previous reports of the number of detainees transferred through the “extraordinary rendition” program, it is likely that a thorough investigation will reveal crimes against other detainees at these facilities, putting their perpetrators within the prosecutorial reach of the federal legal system under 18 U.S.C. § 7. Considering the gravity and violent nature of the abuses these three men suffered without being charged with any crime, one can only presume that many others have been victims of similar crimes covered by this statute, potentially including manslaughter and murder. These serious crimes warrant immediate investigation.

***Conspiracy (18 U.S.C. § 371) and Aiding, Commanding, or Counseling the Commission of Crimes (18 U.S.C. § 2).*** Federal statutes criminalize not only conspiracy to commit torture, but also actions of conspiracy or aiding and abetting where the intended result is assault, sexual abuse, kidnapping, maiming, murder, manslaughter, or other felonies. The

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<sup>24</sup> U.S. v. Passaro, 5:04-CR-211-1 (E.D.N.C.).

defendant need not have intended to commit the crime him or herself, only to further the eventual commission of the violation by others. So long as the acts of conspiracy or assistance take place within the United States, members of the conspiracy are subject to prosecution in federal courts without regard to where the actual felonies were carried out, or whether they were eventually carried out at all. Conspirators are liable for agreements to commit crimes abroad, so long as the agreement was made within the prosecutor's jurisdiction.

As explained above, the specific and credible descriptions of abuse resulting from rendition appear to meet the elements of conspiracy, or aiding and abetting, in the commission of crimes. Even if an independent prosecutor finds that there is insufficient evidence to prove all the elements necessary for the underlying crime of torture, the perpetrators are still criminally liable for conspiracy to commit assault, sexual abuse, kidnapping, and other felonies covered by 18 U.S.C. §§ 2, 371. This argument is particularly compelling in the abduction of Nasr, where Italian courts have issued arrest warrants for two Italian operatives, 25 CIA agents, and a United States military employee for conspiracy to commit kidnapping and unlawful abuse of power. An independent prosecutor is necessary to further investigate any and all violations of this criminal statute and hold the conspirators accountable.

***Military Extraterritorial Jurisdiction (18 U.S.C. § 3261, 32 C.F.R. § 153).*** Federal courts have jurisdiction to try serious crimes committed outside the United States by members of the Armed Forces, as well as civilian employees, contractors, or employees of contractors of the Department of Defense, other Federal agencies, or provisional authorities, when those private employment arrangements relate to supporting the mission of the Department of Defense overseas, and the affected persons are not subject to prosecution under the U.S. Uniform Code of Military Justice (UCMJ) because of their private capacity. The statute also gives the federal

courts jurisdiction over military personnel otherwise subject to the UCMJ for crimes committed with non-military persons. The specific and credible information available regarding the rendition to torture program implicates persons involved in Department of Defense missions in Afghanistan, Germany, and Italy. For example, the arrest warrants issued by Prosecutor Spataro in Milan on July 5, 2006, include charges against a military official at the Aviano joint U.S./Italian airbase for crimes committed in collaboration with CIA and Italian operatives. This case exemplifies the type of abuse this law was intended to punish: crimes committed by persons stationed overseas as part of the Department of Defense's operations, whose positions place them beyond the reach of the military justice system.

**B. An Independent Counsel is Necessary to Investigate and Prosecute the Crimes Arising from the Unlawful Rendition to Torture Program Because High-Ranking Government Officials are Alleged to Have Planned, Approved, and Implemented the Crimes, Under Color of Law.**

The evidence of crimes committed through the program of rendition to torture implicates some of the highest officers of the Executive Branch, including officials in the White House, the Defense Department, and Central Intelligence Agency operatives. Countering statements by members of the Executive Branch that the United States government has not authorized “extraordinary renditions,” the New York Times reported that President Bush issued a classified directive in 2001 that authorizes the CIA to carry out these renditions without case-by-case approval of the White House, Department of State, or Department of Justice.<sup>25</sup> In March 2005, President Bush defended the rendition policies, stating that it is in “our country’s interest to find people who would do harm to us and get them out of harm’s way.”<sup>26</sup> Khaled El-Masri and Maher Arar have alleged the direct involvement of the former Director of the Central

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<sup>25</sup> See Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005.

<sup>26</sup> See Helen Thomas, *‘Ghost detainees’ should haunt CIA*, SEATTLE POST-INTELLIGENCER, May 5, 2005.

Intelligence Agency George Tenet, former Attorney General John Ashcroft, Regional Director of the Eastern Regional Office of the Immigration and Naturalization Service J. Scott Blackman, and Acting Deputy Attorney General Larry D. Thompson. All of these high-ranking Executive Branch positions, vested with the utmost public trust and the authority to act in an official capacity, are listed in the Ethics in Government Act as offices subject to investigation by an independent counsel, rather than the regular attorneys within the Executive Branch's Departments and agencies, so as to avoid a potential conflict of interest.<sup>27</sup> Congress enacted this law to prevent undue influence or reprisals against an attorney within the Executive Branch investigating crimes committed by the listed higher level officials, whose authority is not limited to one agency, and whose position could influence the regular investigative process. Appointment of an independent counsel is the solution Congress adopted to ensure that all persons are subject to the rule of law, regardless of position or power within the government, and to insulate criminal investigations from influence by high-level officials.

Department of Justice regulation 28 C.F.R. part 600.1 requires the Attorney General (or in cases where the Attorney General is recused, the Acting Attorney General) to appoint an outside special counsel when "criminal investigation of a person or matter is warranted," but investigation by the Department of Justice "would present a conflict of interest for the Department or other extraordinary circumstances," and an independent investigation by an outside attorney would be in the public interest.

Appointment of a special attorney in lieu of application for an independent counsel is another available option, but would fail to serve the public interest. Under 28 U.S.C. §§ 515, 543 (2006), the Attorney General may appoint a special attorney from within the Department of

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<sup>27</sup> 28 U.S.C. § 591 (2006).

Justice or another federal agency to investigate a matter when it is in the public interest to do so. However, 28 U.S.C. § 519 vests the Attorney General with supervisory powers over all litigation within the Department, including any initiated by special attorneys appointed pursuant to 28 U.S.C. § 543. Special attorneys are also subject to removal by the Attorney General.<sup>28</sup> Congress enacted the Ethics in Government Act of 1978, creating the process for appointment of an outside independent attorney with supervision by the courts, for situations like this one where a federal attorney might be subject to firing or interference for investigation his or her superiors.<sup>29</sup> Investigating renditions to torture, where the highest officials in the United States government are implicated, certainly creates the potential for retaliation and interference and presents an inherent conflict of interest situation, since the Attorney General and his close colleagues in the government may be implicated in the alleged abuses. Furthermore, the rhetoric surrounding this issue has tainted any potential for an internal investigation that would be able to maintain the appearance of propriety. Appointment of an independent counsel, not a special attorney, is required as the only course possible that would produce a thorough, fair, and politically neutral investigation and could not be influenced or tainted by the interests of other high-level government officials.

**C. The Specific and Highly Credible Information Documenting the Unlawful Rendition to Torture Program Provides Sufficient Evidence to Support the Finding that an Independent Counsel is Needed.**

Former detainees whose stories have been made public have provided the dates, locations, and in some cases even the time of day when their abductions, arbitrary detentions, and torture occurred. They have also given very specific descriptions of persons involved. For example, from a photograph published by a German online newspaper and a police line-up,

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<sup>28</sup> 28 U.S.C. § 543 (2006).

<sup>29</sup> 28 U.S.C. §§ 591-599.

Khaled El-Masri identified his German interrogator with ninety percent certainty as Gerard Lehmann, an officer in the German BKA. El-Masri also identified a waiter who served him during the first days of his confinement in photographs on the website for the hotel in Skopje where he was initially imprisoned and interrogated. It follows that he could also identify his torturers from a police line-up, given the opportunity. El-Masri and other former detainees have stated that they heard sounds as if someone was taking pictures while they were being abused, making it very likely that photographs documenting the abuse exist. El-Masri and Arar have both provided precise details about their detention conditions, including the American products made available to them at the prisons, the accents with which interrogators spoke, the types of vehicles in which they were driven, and even the floor plans of the places in which they were held. Information provided by the former detainees' attorneys and several human rights groups have also provided air traffic records and registration data about the private planes the CIA has used to transport these men and others to countries where interrogators are well known to use torture. Taken together, these details are sufficiently specific to justify appointment of an independent counsel to investigate and prosecute the criminal abuse of these men, as well as crimes perpetrated against any and all detainees who remain unknown because they are still imprisoned or are afraid to come forward.

The specificity of the available information is complemented by its credibility. The details of Khaled El-Masri and Maher Arar's torture and arbitrary detention were set forth in sworn declarations submitted to federal courts. The facts relayed by all three men are corroborated by aircraft logs confirming that flights left and entered the countries they claim on the same dates they assert they were transferred. In El-Masri's case, geological data documents a tremor he felt on April 8, 2004, confirming that he had to have been in Afghanistan at that

time. El-Masri has been able to draw accurate pictures of the hotel where he was held in Macedonia, subsequently corroborated by his German attorney as an accurate plan of the hotel. He has also drawn diagrams of the prison in Afghanistan, corroborated by drawings made by another detainee in the same prison, Laid Saidi. The stamps on El-Masri's passport, submitted as an exhibit with his Declaration to the Court of the Eastern District of Virginia, further support the events he describes as credible. Martin Hofmann, a prosecutor in Munich, Germany, found El-Masri's version of events sufficiently credible to open an investigation, and the German parliament held hearings on El-Masri's abduction and torture in June 2006.

The Canadian government found Maher Arar sufficiently credible to open an official inquiry into the involvement of Canadian officials in transferring Arar to Syria.<sup>30</sup> Although the final report of the Commission of Inquiry has not yet been published, the Commission's Fact Finder found the specific details of Arar's story credible, based on extensive personal interviews with Arar and with other persons formerly detained in the Palestine Branch of Syrian Military Intelligence detention center. In Italy, the Milan prosecutor's investigation of Nasr's abduction resulted in court-ordered arrest warrants against 25 CIA agents and one United States military operative. The information provided by all three of these men has been substantiated in a report adopted by resolution by the European Parliament on July 6, 2006, and corroborated in a report of the Council of Europe authored by Swiss legislator Dick Marty.<sup>31</sup>

While the credibility of these official investigations provide a sufficient legal basis for the Department of Justice to initiate an investigation, it should also be noted that additional information concerning the criminal activities associated with rendition to torture has been

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<sup>30</sup> See <http://www.ararcommission.ca>, the Commission of Inquiry's official website, for documents authorizing, and resulting from, the inquiry (last visited July 9, 2006).

<sup>31</sup> See Interim Report on the Alleged Use of European Countries, *supra* note 4; Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees, *supra* note 4.

verified and corroborated by numerous widely respected news sources cited herein, including the Washington Post, the New York Times, The New Yorker Magazine, CBS News, British Broadcasting Corporation News, London newspaper The Guardian, and German newspaper Der Spiegel. The Washington Post's coverage of "extraordinary renditions" and secret detentions garnered a Pulitzer Prize earlier this year. Recognized authorities on human rights, whose staff are often requested to testify before the United States Congress regarding its international obligations, have also conducted investigations to substantiate claims of rendition to torture. The reports issued by Amnesty International, the Center for Human Rights and Global Justice at the New York University School of Law, Human Rights First, and Human Rights Watch provide consistent, reliable information that on its own justifies initiating an independent investigation into the claims. The collective information available to the Department of Justice in the sworn testimonies of the victims of rendition to torture, the reports issued by international bodies' investigations into their claims, media reports describing the rendition program, and documentation presented by non-governmental human rights organizations provide the specific and credible evidence needed to apply to the District Court for appointment of an independent counsel.

**D. All Department of Justice Officials Involved In Establishing the Policy of Rendition to Torture Must Issue Written Recusals From This Matter.**

Under federal law, 28 U.S.C. § 591(e), a written recusal must be taken by the Attorney General and other Department of Justice officials when a particular matter presents a conflict of interest in conducting a preliminary investigation into the need for an independent counsel. While serving as White House counsel, Attorney General Gonzales was reportedly directly involved in the process of formulating written policies authorizing or justifying the use of torture, or the practice of rendition to torture, as were a number of other high-level officials in

the upper ranks of the Department of Justice and the White House. Statements given to the press that appear to cover up the criminal acts arising from renditions to torture would also color the investigation with an apparent lack of objectivity.<sup>32</sup> Consistent with this statutory requirement, and to prevent the appearance of any undue influence, all Department of Justice officials involved in constructing or implementing the rendition to torture policies must recuse themselves from the process of applying for an independent counsel pursuant to 28 U.S.C. § 591.

## **II. INTERNATIONAL OBLIGATIONS SUPPORT THE APPOINTMENT OF AN INDEPENDENT COUNSEL TO INVESTIGATE CRIMINAL LIABILITY ARISING FROM RENDITION TO TORTURE.**

In addition to the Department of Justice's domestic responsibilities to enforce federal criminal laws, the allegations surrounding the "extraordinary rendition" program invoke the United States Government's international obligations to investigate and prosecute torture abuses and crimes against humanity committed by its citizens, nationals, or employees, against aliens, especially when committed within the sovereign territory of another country. This responsibility is especially pressing in the Nasr case, where an Italian court recently issued arrest warrants for 26 United States nationals for abuses committed in Italy related to Nasr's abduction that every European Union government is responsible for implementing should those suspects be located within its boundaries.<sup>33</sup> Under the bilateral extradition treaty between the United States and Italy, the United States is obliged to extradite persons whom the Italian authorities have charged with a an extraditable offense.<sup>34</sup> The Italian government has yet to request the extradition of these individuals, presumably anticipating that the United States will exercise its responsibility to

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<sup>32</sup> R. Jeffrey Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A03.

<sup>33</sup> See European Arrest Warrant, 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, available at [http://ec.europa.eu/justice\\_home/fsj/criminal/extradition/fsj\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm) (last visited July 9, 2006).

<sup>34</sup> Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, *entered into force* Sept. 24, 1984, TIAS 10837, 35 UST 3023.

hold its own nationals accountable for criminal acts overseas. Appointment of an independent counsel would be the first step necessary to fulfill these treaty obligations with Italy, and to preclude the necessity for extradition and the initiation of criminal proceedings by foreign nations against those involved in rendition practices.

If the United States government refuses to investigate and prosecute its nationals within its own legal system, however, the prosecutor in Milan who prepared the indictments has stated that he will renew his request for extradition. The U.S.-Italian extradition treaty states that failure to initiate an independent investigation into these allegations would shift the burden of prosecution to Italy. Under the “extradite or prosecute” (*aut dedere aut judicare*) principle that underlies the extradition treaty, as well as several of the human rights treaties, if the United States refuses to hold its nationals accountable for the indicted crimes, the Italian prosecutor not only has the right to request extradition, he has the obligation to do so. Such a provision is commonly found in extradition treaties to effectuate one of their key purposes: ensuring that neither country provides refuge to persons accused of crimes within the other’s territory.

Beyond the obligations created by this bilateral treaty with Italy (as well as other similar extradition treaties that the German and Canadian governments might invoke depending on the outcomes of those governments’ investigations), multilateral agreements to which the United States is a party also require investigation and prosecution of these crimes, and adopt the “extradite or prosecute” approach. The United States Government adopted the international obligations enumerated in the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment when the Senate ratified the treaty in 1994.<sup>35</sup> The Torture Convention Implementation Act, codified as 18 U.S.C. § 2340A, implemented the

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<sup>35</sup> Convention Against Torture, *supra* note 13.

United States' obligations to criminalize torture and conspiracy to commit torture, as set forth by Articles 4 and 5 of the Convention, and made them part of domestic law.<sup>36</sup> Foreseeing the impunity that could result if a State Party fails to enforce its criminal statutes adopted pursuant to Articles 4 and 5, Article 7 of the Convention explicitly embraces the *aut dedere aut judicare* principle, requiring that the State Party with territorial jurisdiction over a person alleged to have committed the crime of torture extradite the defendant or "submit the case to its competent authorities for the purpose of prosecution." Article 7 thus obligates the United States to investigate all credible allegations of torture or conspiracy to commit torture in violation of 18 U.S.C. § 2340A, and to extradite any United States nationals indicted by foreign governments for trial in those governments' courts if they are not prosecuted for these abuses in the United States.

The prohibition against torture and cruel, inhumane, or degrading treatment is also part of Article 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup>, ratified by the United States in 1992. Although the ICCPR does not include an explicit "extradite or prosecute" clause, the Human Rights Committee, the body created by the ICCPR to monitor States Parties' implementation and compliance, has held that *aut dedere aut judicare* is an implied functional necessity if the prohibitions against torture and cruel punishment or treatment in the Covenant are to have any meaning.<sup>38</sup> While States party to the ICCPR are required to have a criminal statute prohibiting torture in its laws, the existence of such a statute alone does not complete a State's obligation to prevent and punish specific instances of torture or cruel, inhumane, or

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<sup>36</sup> Albeit with a more narrow definition of torture than that set forth by the Convention.

<sup>37</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 7, U.N.T.S. 171, 174-76, 6 I.L.M. 368, 370-71.

<sup>38</sup> U.N. Human Rights Committee, General Comment No. 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7) (Oct. 3, 1992) ¶ 8 (advising States Party to the ICCPR "that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction").

degrading treatment or punishment. The investigative agencies and judiciary must utilize the statute by conducting thorough, fair inquiries of all claims of torture and cruel, inhumane, or degrading treatment or punishment, followed by prosecution and punishment when necessary. Only when the statutory prohibition against torture is fully implemented in this way does the State truly protect its citizens' from torture and thus fulfill its obligations under the ICCPR and the Torture Convention.

Despite these treaty obligations, the Department of Justice has never prosecuted anyone for torture abuse under 18 U.S.C. § 2340A, in the context of the rendition to torture program or for any other reason. The United States government is neglecting its obligation to prevent and punish torture within its jurisdiction when it fails to act, given the extensive and well-documented nature of the allegations that have been made. This failure to act invites prosecution by other countries in fulfillment of their own international obligations, creating the possibility that American citizens might be tried in foreign courts. In light of the ongoing investigations by three foreign governments, multiple international bodies, and, most alarming, the arrest warrants issued in Italy for CIA agents and U.S. military personnel, the need to “extradite or prosecute” persons involved in rendering detainees to torture is far from hypothetical. Most importantly, failing to provide the fullest possible implementation of the prohibition against torture – arguably the most fundamental, universally recognized of all international norms – undermines the United States’ longstanding position as the world’s leader in protecting human rights. Appointing an independent counsel to investigate and prosecute the criminal acts alleged by survivors of the “extraordinary rendition” program is essential to satisfy the Government’s obligations under international law, and to maintain the United States’ credibility as an advocate for human rights observance worldwide. It is also the only reasonable method for avoiding a situation where

courts in other countries are forced into a position of applying criminal sanctions to United States officials for their participation in rendition to torture.

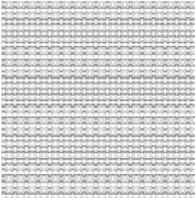
Respectfully Submitted,



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# **ATTACHMENT B**



# WORLD ORGANIZATION FOR HUMAN RIGHTS USA

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Formerly the World Organization Against Torture USA

Morton Sklar, Executive Director

June 26, 2004

## CRIMINAL COMPLAINT

**TO:** The Honorable John Ashcroft, Attorney General of the United States of America.

**RE: CRIMINAL COMPLAINT SEEKING THE INVESTIGATION AND PROSECUTION OF U.S. OFFICIALS IMPLICATED IN THE TORTURE OF DETAINEES.**

On this day, the 26<sup>th</sup> of June, set aside by the international community to commemorate the observance of Torture Survivors' Day, we call upon the Attorney General as chief law enforcement official of the United States to take definitive action to deal with the growing revelations suggesting that U.S. officials at the highest levels may have been involved in the policy of encouraging the use of torture of suspected terrorist detainees.

Recent revelations published in the *Wall Street Journal*, the *Washington Post*, the *New York Times* and other authoritative sources indicate that high-level Justice and Defense Department officials provided written approval of policies authorizing the use of torture to obtain information from detainees and suggesting that those committing torture could not be prosecuted. These memoranda provide the most compelling evidence to date that the abuses at Abu Ghraib prison and elsewhere may not have been the isolated acts of a few, but rather part of a systemic and officially sanctioned policy of condoning, justifying and encouraging the use of torture to obtain information from suspected terrorists. Any officials who participated in establishing this policy acted in violation of legal obligations under U.S. law and treaty standards binding on the U.S., including the Convention Against Torture and the Geneva Conventions. Criminal sanctions apply to some of these violations and they must be investigated and applied.

A number of high-level U.S. officials recently have been identified as being involved in, promoting or encouraging the use of torture in the treatment of detainees held in Iraq and other locations. Human rights groups and the press have uncovered enough facts to suggest that there is a reasonable basis for believing that these abuses were not isolated but part of an organized and approved policy established by the U.S. government on a more widespread basis. The facts that have been reported are sufficient to require a full and fair investigation that will lead to the prosecution of those

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The World Organization for Human Rights USA (or Human Rights USA for short) is an independent, affiliated national member of the International World Organization Against Torture and SOS Torture Networks.

responsible, including high-level officials that helped to set this policy in motion.

Identified below is a list of some of the specific officials who have been named as potentially being involved in establishing or promoting a policy encouraging the use of torture, as well as a listing of the specific laws and standards that may have been violated.

We call upon you to immediately institute a criminal investigation of these and all other individuals who may be involved in the violations of domestic and international laws that prohibit the use of torture on an absolute basis, with the purpose of filing criminal charges against those found responsible under the criminal provisions of the Convention Against Torture as well as other applicable legal requirements. Given the fact that some of the highest level officials in our Department of Justice may have been involved in the process of formulating or encouraging the unlawful use of torture, we further request that you appoint a special attorney to supervise the investigation and any subsequent criminal prosecutions it may produce, and that you grant that special attorney the fullest authority and responsibility to carry out their mandate on as independent a basis as possible. You have the authority to take such a step under 28 USC §§ 515 and 543.

There are a number of applicable laws and legal standards that support the criminal prosecution and punishment of torture. The United States is duty-bound under our own laws and international treaty obligations to fully investigate and prosecute all those who may be responsible for encouraging and participating in acts of torture, irrespective of their positions of authority and the offices they hold. The credibility of our efforts to prevent torture and other human rights abuses in other nations, and the safety and security of our military forces and other citizens abroad who may come under the control and authority of foreign officials require that we take the allegations that have been made more seriously, and investigate and prosecute every U.S. official who has committed or facilitated the commission of torture. Only through a comprehensive effort to identify and prosecute all of those responsible for the Abu Ghraib abuses and other instances of torture can we hope to reestablish our nation's credibility as a major promoter of human rights and the rule of law.

### **BRIEF LISTING OF OFFICIALS AND CONTRACTORS IDENTIFIED AS BEING POTENTIALLY INVOLVED IN PROMOTING A POLICY TO USE TORTURE**

Several U.S. officials and contractors have been identified by human rights and press sources as being potentially involved in promotion, dissemination, and facilitation of a policy supporting the use of torture as a means of obtaining information from suspected terrorist detainees.

#### **1. Donald Rumsfeld, Secretary of Defense:**

- Approved secret Pentagon project using force for interrogation of Al-Qaeda suspects to be used against detainees in Iraq. Seymour M. Hersh, *The Gray Zone*, The New Yorker, May 24, 2004.

- Ordered military officials in Iraq, in November 2003, to hold a detainee off the prison rolls in order to prevent the International Committee of the Red Cross from monitoring his treatment, in violation of international law. Additionally, prisoners reportedly are being held in at least a dozen facilities which operate in secret, hidden from Red Cross monitoring. Eric Schmitt and Tom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, The New York Times, June 17, 2004; *Rumsfeld, at Tenet's Request, Secretly Held Suspect in Iraq*, Wall Street Journal, June 17, 2004; Human Rights First, *Ending Secret Detentions*, June 2004.
- Command-responsible for abuses committed at Bagram Airbase and elsewhere in Afghanistan. See generally Human Rights Watch, "Enduring Freedom" Abuses by U.S. Forces in Afghanistan, March 2004.
- Approved methods for Guantanamo interrogations, including the use of dogs to intimidate prisoners in January 2002. Jess Bravin and Greg Jaffe, *Rumsfeld Approved Methods for Guantanamo Interrogations*, Wall Street Journal, June 10, 2004; R. Jeffrey Smith and Josh White, *General Granted Latitude at Prison*, Washington Post, June 12, 2004.
- Approved orders sending General Miller from Guantanamo Bay to Iraq to institute harsher interrogation techniques, which included the use of dogs, shackling, and forcing detainees to strip. R. Jeffrey Smith, *General is Said to Have Urged Use of Dogs*, Washington Post, May 26, 2004.
- Approved the use of tougher interrogation techniques in Iraq in 2003 to obtain information from detainees. Some techniques deviated from the Army's standard interrogation methods and amounted to torture. Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, Wall Street Journal, June 7, 2004; David Johnston and Tim Golden, *Rumsfeld and Aide Backed Harsh Tactics, Article Says*, The New York Times, May 16, 2004.
- Ordered the establishment of the Interrogation Working Group that issued an April 2003 memo concluding that the prohibition against torture did not apply to interrogations undertaken pursuant to the President's military orders as Commander-in-Chief. Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, Wall Street Journal, June 7, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004; Neil A. Lewis and Eric Schmitt, *Lawyers Decided Ban on Torture Didn't Bind Bush*, New York Times, June 8, 2004.

## 2. Stephen Cambone, Under-Secretary of Defense for Intelligence:

- Headed secret Pentagon interrogation project focused on Al-Qaeda to be used against detainees in Iraq. Seymour M. Hersh, *The Gray Zone*, The New Yorker, May 24, 2004.
- Approved the use of harsher interrogation techniques, some which deviated from the Army's standard interrogation methods and amounted to torture, in Iraq in 2003 to obtain information from detainees. Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, The Wall Street Journal, June 7, 2004; David Johnston and Tim Golden, *Rumsfeld and Aide Backed Harsh Tactics, Article Says*,

The New York Times, May 16, 2004.

- Approved order sending General Miller from Guantanamo to Iraq to institute harsher interrogation techniques, which included the use of dogs, shackling, and forcing detainees to strip. R. Jeffrey Smith, *General Is Said to Have Urged Use of Dogs*, Washington Post, May 26, 2004.
- Command-responsible for abuses committed at Bagram Airbase and elsewhere in Afghanistan. See generally Human Rights Watch, “*Enduring Freedom*” Abuses by U.S. Forces in Afghanistan, March 2004.

### **3. Lieutenant General Ricardo Sanchez, Commander in Iraq:**

- Received and approved General Miller's recommendations to bring Guantanamo Bay interrogation techniques to Iraq, including use of military dogs, temperature extremes, reversed sleep patterns, sensory deprivation, stress positions, shackling, forcing detainees to strip, and manipulation of diets. Seymour M. Hersh, *The Gray Zone*, The New Yorker, May 24, 2004; R. Jeffrey Smith and Josh White, *General Granted Latitude at Prison*, Washington Post, June 12, 2004; R. Jeffrey Smith, *General Is Said To Have Urged Use of Dogs*, Washington Post, May 26, 2004.
- Allegedly present during some interrogations and/or incidents of prisoner abuse. Scott Higham, Joe Stephens, and Josh White, *Prison Visits by General Reported in Hearing: Alleged Presence of Sanchez Cited by Lawyer*, Washington Post, May 23, 2004.
- Transferred formal command of Abu Ghraib in November 2003 to the 205<sup>th</sup> Military Intelligence Brigade, under Colonel Thomas M. Pappas, which was responsible for prisoner abuse. Maj. Gen. Antonio Tabuga, *Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade*, March 3, 2004 (Taguba Report).
- Signed an October 12, 2003, memorandum calling for intelligence officials at Abu Ghraib to work more closely with military police to “manipulate an internee’s emotions and weaknesses.” The memorandum explicitly called for interrogators to assume control over the “lighting, heating ... food, clothing, and shelter” of those questioned. R. Jeffrey Smith, *Memo Gave Intelligence Bigger Role; Increased Pressure Sought on Prisoners*, Washington Post, May 21, 2004.
- Directed the Combined Joint Task Force-7, which approved the September 10, 2003, memorandum “Interrogation and Counter-Resistance Policy” that permitted the use of yelling, loud music, a reduction of heat in winter and air conditioning in summer, and “stress positions” for as long as 45 minutes every four hours. R. Jeffrey Smith and Josh White, *General Granted Latitude at Prison*, Washington Post, June 12, 2004.
- Signed a September 14, 2003, memorandum, which allowed for the use of dogs during interrogations without special approval. R. Jeffrey Smith, *General is Said to Have Urged Use of Dogs*, Washington Post, May 26, 2004.
- Command-responsible for abuses committed in Iraq.

### **4. Col. Thomas Pappas, head of military intelligence at Abu Ghraib:**

- Cited in the Taguba report as responsible for detainee abuses. Maj. Gen. Antonio Tabuga, *Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade*, March 3, 2004 (Taguba Report).

- Allegedly approved sleep deprivation tactics, the use of unmuzzled dogs, and other practices to intimidate detainees. He approved interrogation plans involving the use of dogs, shackling, and forcing detainees to strip. *Iraq Jail Contractor Contradicts Generals*, The Associated Press, June 15, 2004; Josh White and Scott Higham, *Use of Dogs to Scare Prisoners Was Authorized*, Washington Post, June 11, 2004; R. Jeffrey Smith, *General Is Said To Have Urged Use of Dogs*, Washington Post, May 26, 2004.

**5. Major General Jeffrey Miller, deputy commanding general for detention operations in Iraq and former commander in charge of Guantanamo Bay:**

- Briefed Iraq detention officers on Guantanamo interrogation methods, with the goal of “rapidly exploit[ing] internees for actionable intelligence.” Allegedly discussed the use of dogs to frighten detainees and facilitate interrogations with the senior military intelligence official at Abu Ghraib. Seymour M. Hersh, *The Gray Zone*, The New Yorker, May 24, 2004; Maj. Gen. Antonio Tabuga, *Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade*, March 3, 2004 (Taguba Report); R. Jeffrey Smith, *General Is Said To Have Urged Use of Dogs*, Washington Post, May 26, 2004; Douglas Jehl and Eric Schmitt, *In Abuse, a Portrayal of Ill-Prepared, Overwhelmed G.I.’s*, The New York Times, May 9, 2004.
- According to the Taguba report, General Miller recommended that the guards at Abu Ghraib and other facilities “be actively engaged in setting the conditions for successful exploitation of the internees.”
- Allegedly told Brig. Gen. Janis Karpinski, who was in charge of Abu Ghraib, that detainees should be treated like dogs. *Abu Ghraib General Says Told Prisoners ‘Like Dogs’*, Reuters, June 15, 2004.

**6. Brig. General Janis Karpinsky:**

- Her leadership failures led to the abuses at Abu Ghraib, making her directly responsible for them. Maj. Gen. Antonio Tabuga, *Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade*, March 3, 2004 (Taguba Report).
- Allegedly reviewed and approved reports by a small unit of interrogators of Abu Ghraib describing abuse of prisoners at Abu Ghraib between November 2003 and January 2004. Andrea Elliott, *Unit Says It Gave Earlier Warning of Abuse in Iraq*, The New York Times, June 14, 2004.
- Signed a December 24, 2003 letter to the International Committee of the Red Cross justifying the abuse of detainees as a “military necessity” to obtain intelligence. *Documents Build a Case for Working Outside the Laws in Interrogations*, The New York Times, June 9, 2004.
- Command-responsible for abuses committed in Abu Ghraib prison and other detention facilities under her command.

**7. Capt. Carolyn A. Wood, served in supervisory positions at interrogation units at Bagram and Abu Ghraib:**

- Allegedly brought harsh interrogation procedures developed in Afghanistan to Iraq. Douglas Jehl and David Rohde, *Afghan Deaths Linked to Unit at Iraq Prison*, The New York Times, May 24, 2004.

## **8. Attorney General John Ashcroft:**

- Responsible for a series of Justice Department memoranda that allowed the Defense Department to circumvent domestic and international law and facilitated acts of torture.
- An August 1, 2002, Justice Department memorandum advised the White House torture “may be justified,” and that international laws prohibiting torture “may be unconstitutional if applied to interrogations” conducted in the war on terrorism. The memorandum was signed by Assistant Attorney General Jay S. Bybee. Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004; Memorandum from Office of Legal Counsel, “Standards of Conduct for interrogation under 18 USC §§ 2340-2340A,” Aug. 1, 2002.
- A January 22, 2002, Justice Department memorandum provided arguments to prevent American officials from being charged with war crimes regarding the detention and interrogation of prisoners. The memorandum said that the Geneva Conventions did not apply to detainees from the Afghanistan war. Neil A. Lewis and Eric Schmitt, *Lawyers Decided Ban on Torture Didn’t Bind Bush*, The New York Times, June 8, 2004.
- A January 9, 2002, Justice Department memorandum gave arguments to keep US officials from being charged with war crimes and arguments for avoiding jurisdiction of the Geneva Conventions. Memorandum from John Yoo and Robert J. Delahunty, “Application of treaties and laws to Al Qaeda and Taliban detainees,” Jan. 9, 2002; Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, The New York Times, May 21, 2004.
- The New York Times also reported the existence of another Justice Department memorandum that explicitly said charges of torture could be avoided if the detainee had been transferred to another country from American custody. This set the basis for “rendition to torture.” Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, The New York Times, May 21, 2004.
- Oversaw the senior justice department official that rendered Syrian-Canadian citizen Maher Arar unto torture in Syria. Dana Priest, *Top Justice Aide Approved Sending Suspect to Syria*, Washington Post, Nov. 19, 2003.
- An April 2003 Defense Department report on interrogation methods, concluding that the President was not bound by prohibitions against torture, relied heavily on the August 2002 and January 22, 2002, Justice Department memoranda. Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004; Neil A. Lewis and Eric Schmitt, *Lawyers Decided Ban on Torture Didn’t Bind Bush*, The New York Times, June 8, 2004.

## **9. Alberto Gonzales, Counsel to the President:**

- Issued a January 25, 2002, memorandum to President Bush urging the Bush administration to declare captives exempt from the protections of the Geneva Conventions in order to pre-empt war crimes charges and justify the denial of rights and more extreme forms of interrogation. This memorandum provided a presumed legal basis for the abuses in Guantanamo and Afghanistan, and, through General

Miller's advice and actions, in Iraq. Memorandum from Alberto R. Gonzales, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban," January 25, 2002.

#### **10. George J. Tenet, former Director of the Central Intelligence Agency**

- CIA employees under Mr. Tenet's supervision and control were directly involved in the interrogation and abuse of detainees in Iraq and Afghanistan and had knowledge of the abuses taking place. The Department of Justice is investigating the involvement of CIA officers and CIA contract employees in three deaths of detainees, and has indicted one CIA contractor for the death of a detainee in Afghanistan. *Many Abuse Inquiries Under Way*, BBC News Online, May 6, 2004; David Johnston and Neil A. Lewis, *U.S. Examines Role of CIA and Employees in Iraq Deaths*, New York Times, May 6, 2004; Richard A. Oppel Jr. and Ariel Hart, *Contractor Indicted in Afghan Detainee's Beating*, New York Times, June 18, 2004.
- Detainees held at the CIA interrogation center at Bagram air base in Afghanistan, and subject to CIA supervision, were "kept standing or kneeling for hours in black hoods or spray-painted goggles... [and] held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as 'stress and duress' techniques." Dana Priest and Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, Washington Post, December 26, 2002.
- The CIA prompted the Justice Department to write the August 1, 2002, memo, which advised the White House that torture "may be justified," and that international laws prohibiting torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. Michael Hirsch, John Barry, and Daniel Klaidman, *A Tortured Debate*, Newsweek, June 21, 2004; Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, Washington Post, June 8, 2004; Memorandum from the U.S. Department of Justice Office of Legal Counsel, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002.
- A February 2, 2002, memo notes that CIA lawyers asked for an explicit authorization that Geneva Convention prohibitions did not apply to its operatives. Neil A. Lewis and Eric Schmitt, *Lawyers Decided Ban on Torture Didn't Bind Bush*, New York Times, June 8, 2004.
- Determined with Defense Secretary Rumsfeld, in November 2003, that an Iraqi detainee be held off the prison rolls in order to prevent the International Committee of the Red Cross from monitoring his treatment, in violation of international law. Additionally, prisoners reportedly are being held in at least a dozen facilities which operate in secret, hidden from Red Cross monitoring. The ostensible reason for this and other "secret detentions" is to allow for non-monitored interrogations that potentially involve abuse. Eric Schmitt and Tom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, New York Time, June 17, 2004; *Rumsfeld, at Tenet's Request, Secretly Held Suspect in Iraq*, Wall Street Journal, June 17, 2004; Human Rights First, *Ending Secret Detentions*,

June 2004.

- The CIA operates its own detention centers, separate from the Pentagon's detention system such as Guantanamo and Abu Ghraib, hiding detainees from the Red Cross. Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation*, Washington Post, May 11, 2004.
- Since September 11th, the U.S. has quietly transported hundreds of suspects captured in different parts of the world to Middle Eastern countries for harsher interrogations. The CIA has transferred detainees to foreign intelligence services for interrogations and uses the jails of Egypt, Syria, Morocco, and Uzbekistan where extreme methods such as electric shock and drugs can be used on suspects with no access to lawyers or prospects of freedom. Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation*, Washington Post, May 11, 2004; Stephen Grey, *America's Secret Gulags*, Mail on Sunday (London), May 16 2004. *His Year in Hell*, CBSnews.com, January 20, 2004.

#### **11. CACI International Inc:**

- Interrogation contractor alleged to violate RICO, conspiracy to violate RICO, conspiracy to violate rights secured by the Geneva Conventions, as well as conspiracy to torture. Complaint, *Al-Rawi v. Titan*, (S.D. Cal. 2004) (No. 04-1143).

#### **12. TITAN Corporation:**

- Interrogation contractor alleged to violate RICO, conspiracy to violate RICO, conspiracy to violate rights secured by the Geneva Conventions, as well as conspiracy to torture. Complaint, *Al-Rawi v. Titan*, (S.D. Cal. 2004) (No. 04-1143).

### **LAWS PROHIBITING TORTURE AND ESTABLISHING CRIMINAL PENALTIES FOR VIOLATIONS**

A number of domestic and international laws prohibit the use of torture on an absolute basis and establish criminal penalties for violations. United States criminal courts have jurisdiction over crimes committed by or against a U.S. national on the premises of any U.S. government mission in foreign countries, including any military and diplomatic missions. 18 USC §7(9). The Military Extraterritorial Jurisdiction Act grants jurisdiction over certain federal crimes that are committed by military contractors and others accompanying the armed forces abroad. 18 USC § 3261.

#### **Convention Against Torture.**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) binds parties to take measures to prevent torture within their respective jurisdiction. Article 2 of the convention states that no exceptional circumstances whatsoever – including war, threat of war or other emergency – may be invoked as a justification for torture.

Pursuant to Article 5 of the Convention, the United States has criminalized acts of torture abroad: "Offense – whoever outside the United States commits or attempts to

commit torture shall be fined under this title or imprisoned not more than 20 years . . . ." 18 USC § 2340A(a).

Conspiracy to commit acts of torture abroad is also covered, "Conspiracy. – A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy." 18 USC § 2340A(c).

### **Other Federal Crimes.**

Several federal criminal statutes punish the actions alleged to have been committed throughout the detainee system. These include:

1. Assault. 18 USC § 113.
2. Maiming. 18 USC § 114.
3. Murder. 18 USC § 1111.
4. Manslaughter. 18 USC § 1112.

Some parts of the detainee system may be outside the territorial jurisdiction of these provisions. However, the criminal code also punishes those who aid, command, procure and counsel the violations as principals. 18 USC § 2. Similarly, those who conspire to violate these provisions are also liable. 18 USC § 371. Conspirators and non-present principals may have committed their violations within the territorial jurisdiction of the criminal code.

### **Uniform Code of Military Justice.**

The Uniform Code of Military Justice contains several provisions applicable to the abuse of detainees in Iraq and the wider war on terror, including but not limited to:

1. Maiming. 10 USC § 924.
2. Assault. 10 USC § 928.
3. Conspiracy. 10 USC § 881.
4. Accessory after the fact. 10 USC § 878.
5. Murder. 10 USC § 918.
6. Manslaughter. 10 USC § 919.

### **War Crimes Act / Geneva Conventions.**

The War Crimes Act of 1996 punishes violations of Article 3 of the Geneva Conventions and the grave breaches as defined in those Conventions. 18 USC § 2441. Article 147 of the Fourth Geneva convention lists as grave breaches: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health. The common Article 3 calls for blanket humane treatment, and to that end prohibits: violence to life and person, including murder, mutilation, cruel treatment and torture; the taking of hostages; and outrages upon personal dignity, such as humiliating and degrading treatment. There should be no dispute that the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War applies to Iraq.

### **Deprivation of Rights.**

Violations and conspiracies to violate the rights of detainees established under U.S. law are prohibited. 18 USC §§ 241, 242.

Respectfully Submitted,

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